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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER JAY EWING, Defendant and Appellant.	B175757 (Los Angeles County Super. Ct. No. LA042668)

APPEAL from a judgment of the Superior Court of Los Angeles County. Darlene Schempp, Judge. Affirmed.

Elizabeth A. Missakian, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael R. Johnsen and Jonathan J. Kline, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Christopher Jay Ewing was convicted, following a jury trial, of one count of robbery in violation of Penal Code section 211. The trial court found true the allegations that appellant had suffered two prior serious or violent felony convictions within the meaning of sections 667, subdivisions (b) through (i) and 1170.12 (the "three strikes" law). The trial court sentenced appellant to a term of 25 years to life in state prison pursuant to the three strikes law.

Appellant appeals from the judgment of conviction, contending that the trial court erred in denying his motions to suppress evidence and further contending that there is insufficient evidence to support his conviction. We affirm the judgment of conviction.

Facts

Robert Jung, an elderly man who was an acquaintance of appellant's, drove appellant to various locations in North Hollywood on March 17, 2003. Appellant told Jung that he was scouting locations for a movie. Appellant, who is African-American, was wearing camouflage clothing. Sometime after 2:00 p.m., Jung parked his car near Burbank Boulevard. Appellant got out of the car and told Jung that he wanted to take a look at a pharmacy.

That same day, between 2:30 and 3:00 p.m., an African-American man in camouflage clothing entered the Cambridge Care Pharmacy on Burbank Boulevard. Artuyan Sultanyan was working there at the time. The man gave Sultanyan a written demand for money. The man's right hand was concealed in his pocket and Sultanyan feared that he had a gun. The man took cash, prescription medicine and Sultanyan's Rolex watch and jewelry.

Also that same day, Jonathan Spector, who lived on Rhodes Street near Burbank Boulevard, noticed an African-American man dressed in camouflage clothing get out of a parked car and walk toward Burbank Boulevard. He also saw the man running down the street and believed that he saw the man in Jung's car when Jung drove away from the area.

When appellant returned to Jung's car, he told Jung to "get the hell out of here." Appellant stayed on the floor of the car for several minutes, and told Jung that he had "lifted" some pills from a pharmacy. Jung drove away.

Spector followed Jung, and called 911. The 911 operator told Spector to quit following the car. At some point later that day, Spector gave the car's license plate number to police. It matched Jung's car's license plate number.

Jung took appellant to a house in the vicinity of 42nd Street and Vermont and left him there. Cathy Barnes, a friend of appellant's, lived there. According to Barnes, appellant may have been wearing a navy blue knitted cap and a navy blue pea coat. She did not see appellant with a large amount of cash, jewelry or a Rolex watch. Barnes is the listed subscriber for the cell phone which appellant used. That number was used to call Jung's cell phone multiple times on March 17.

When Jung returned to his home, he found a note from police on his door. When he walked outside ten to fifteen minutes later, he was arrested. Spector identified Jung in a field show-up as the driver of the car Spector had followed earlier. Jung cooperated with police, told them about driving appellant around and that he had dropped appellant off in the vicinity of Vermont and 42nd Street.

On March 19, police showed Sultanyan a six pack photographic line-up. Sultanyan tentatively identified the number 2 and 3 photos. Number 3 depicted appellant. At trial, however, Sultanyan testified that he was 80% sure that the person in photo number 2 was the robber.

On March 20, Los Angeles Police Detective James Gerardi searched appellant's residence. He recovered a cell phone, $870 rolled up in a sock, a camouflage hat and a picture of appellant in camouflage clothing.

Discussion

1. Motions to suppress evidence

Appellant contends that the trial court erred in denying his motions to suppress evidence. He contends that the search warrant fails to establish probable cause to search

his house, the warrant was not specific enough and the affiant recklessly omitted facts from the affidavit. We see no error.

The standard of review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. (*People* v. *Glaser* (1995) 11 Cal.4th 354, 362.)

a. Probable cause

Appellant first contends that the affidavit did not establish probable cause because it relied on Jung's statement, which was not trustworthy and not corroborated.

Evidence before a magistrate issuing a warrant must be competent and must appear in the supporting affidavit. (*Grau* v. *United States* (1932) 287 U.S. 124, 128.) In determining whether probable cause is established, we assess the totality of the circumstances under which the warrant was issued. (*Illinois* v. *Gates* (1983) 462 U.S. 230, 231-235.) "'In dealing with probable cause, . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' [Citation.]" (*Id*. at p. 231.) Thus, probable cause requires a "probability" of criminal activity. (*Id*. at p. 235.)

Here, the affidavit set forth the statements of at least three witnesses, which together provide more than ample support for a finding of probable cause that appellant was the robber. Spector saw an African-American man in camouflage clothing get out of a car which was later determined to belong to Jung. The man headed toward the pharmacy. At the pharmacy, Sultanyan was robbed by an African-American man in camouflage clothing. Spector saw the man in camouflage run from the pharmacy. Jung later told police that the man in camouflage clothing was appellant.

We cannot agree with appellant that the above statements do not constitute "facts." The witnesses' statements are observations of events. Such observations, if accepted by

the trier of fact, as they were here by the magistrate, become facts. The observations provide mostly circumstantial evidence that appellant was the robber, but search warrants, like convictions, may be based on circumstantial evidence.

We also cannot agree with appellant that Jung's statement was untrustworthy. Appellant is correct that Jung was arrested for the robbery. However, Spector told police that there were two men in Jung's car, and there is no reason to believe that Jung falsely identified appellant as the passenger in his car. To the extent that Jung's statement required further corroboration, Sultanyan's tentative identification of appellant from a photographic line-up was sufficient.

b. Specificity

Appellant initially contends that the warrant failed to adequately specify the place to be searched or the property to be seized. He then backtracks, saying, "the issue is that the affidavit provided no factual support for a finding that the evidence sought in the warrant would be found in appellant's home." We cannot agree.

A search warrant must describe with particularity the place to be searched and the things to be seized. (U.S. Const., 4th Amend.)

The warrant was quite clear about the location to be searched: 12935 Kornblum Avenue, Apartment G, Hawthorne, California. In addition to the address, the warrant gave a detailed description of the building's appearance and the apartment's location within the building. No police officer would have any difficulty identifying this location.

The property to be seized is described as handguns (and related items such as cleaning kits), documents that would establish the identity of the person in control of the apartment, evidence of gang membership, and items described on page three of the police report. Page three of the police report lists items stolen in the robbery. It was attached to the warrant as Addendum # 1.

The descriptions of the items were as specific as possible and were sufficient to place meaningful restrictions on the items to be seized. The description of the stolen

jewelry was precise.[1] The term "handgun" ruled out other types of guns. "Prescription medicine" is a commonly understood phrase, and establishes a limited class of drugs for which to search. Eighty-five hundred dollars in currency indicates that a large amount of currency was involved, and currency cannot be described with more particularity. The description of "[a]rticles of personal property tending to establish the identity of the persons in control of the premises and the vehicles being searched including rent receipts, utility company receipts, addressed mail and keys" is also acceptable. (See *People* v. *Senkir* (1972) 26 Cal.App.3d 411, 415, 421.)

With the exception of the gang evidence, there was ample support for a finding that the items might be found in appellant's residence. There was some indication that appellant used a handgun in the robbery, and the victim provided the list of items stolen in the robbery. Items confirming appellant's control of the residence could reasonably be expected to be found therein. Assuming for the sake or argument that there was no evidence to indicate that appellant's gang membership had any role in the robbery, we would still find the remainder of the warrant valid. (See *Aday* v. *Superior Court* (1961) 55 Cal.2d 789, 795-798.) Since no evidence of gang membership was discovered during the search, there was no prejudice to appellant.

c. Material omissions

Appellant contends that Detective Gerardi falsely stated in his affidavit that appellant had been identified by Spector when Spector's trial testimony showed that he could not identify the person he saw running. Appellant also contends that the affiant did not state that Sultanyan failed to identify appellant. Appellant further contends that the detective misled the magistrate by referring to the suspect as Ewing [appellant] throughout the affidavit.

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[1] The jewelry was described as a 24-inch, chain link style necklace with alternating white and yellow gold links, a pendant of a cross with a white stone, and a Rolex watch with a white and yellow wristband.

An affidavit supporting a search warrant is presumed valid. (*Franks* v. *Delaware* (1978) 438 U.S. 154, 171, 98 S.Ct. 2674, 57 L.Ed.2d 667.) A defendant has a limited right to challenge the validity of a search warrant by controverting the factual allegations of the affidavit supporting the warrant. (*People* v. *Bradford* (1997) 15 Cal.4th 1229, 1297.)

"[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment . . . requires that a hearing be held at the defendant's request." (*Franks* v. *Delaware*, *supra*, 438 U.S. at pp. 155-156.)[2] "To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted today is only that of the affiant, not of any nongovernmental informant." (*Id*. at p. 171.)

A defendant who challenges a search warrant on the basis that there are omissions from a supporting affidavit bears the burden of showing that the omissions were material

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[2] In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause were lacking on the face of the affidavit. (*Id*. at p. 156.)

to the determination of probable cause. (*People* v. *Bradford*, *supra*, 15 Cal.4th at p. 1297.)

The question of whether a defendant's evidence constitutes a substantial showing under *Franks* is a question of law. Accordingly, we review de novo the trial court's determination of this issue. (*People* v. *Box* (1993) 14 Cal.App.4th 177, 183; *People* v. *Sandlin* (1991) 230 Cal.App.3d 1310, 1316.)

Here, appellant contends that Detective Gerardi falsely stated in his affidavit that appellant had been identified by Spector, failed to state that Sultanyan did not identify appellant, and misled the magistrate by referring to the suspect as Ewing throughout the affidavit. We find that appellant has not established that he was entitled to a *Franks* hearing.

Appellant has not provided a quote or citation to support his contention that Detective Gerardi stated that Spector identified appellant. We see no such statement in the affidavit. Detective Gerardi stated that Spector identified Jung as the driver of the Buick, and that Jung identified Ewing as the man in his car.

As appellant points out, Detective Gerardi did refer to the suspect as Ewing, sometimes parenthetically, and sometimes not. We see nothing in this usage which was misleading. Ewing was the suspect. The use of the name Ewing began with the first mention of the suspect, and in no way implied that every person who encountered the suspect identified him. We do not understand the affidavit as claiming that Spector identified appellant Ewing, and we do not believe that a reasonable magistrate would understand that affidavit as so claiming either.

We see nothing false about Detective Gerardi's assertion that Sultanyan made a tentative identification of appellant. Appellant did not offer any evidence to support this claim in the trial court. On appeal, he relies on trial testimony by Sultanyan to support his claim. We see nothing in that testimony to render Detective Gerardi's statement false.

Sultanyan testified that he circled two photographs in a six-pack photographic line-up, one of which was of appellant. He acknowledged writing (or saying), "I'm not sure the suspect look like number 2 or number 3 [appellant]." This is a tentative

identification. Appellant is correct that Sultanyan also testified that he was 80% sure that number 2 was the robber. He did not testify that he told this to Detective Gerardi. Detective Gerardi testified that Sultanyan did not tell him that he was 80% certain that number 2 was the robber.

2. Sufficiency of the evidence

Appellant contends that the evidence is not sufficient to support the verdict because Sultanyan and Spector did not identify him, and Jung's description of appellant was contradicted by another witness. We see sufficient evidence.

In reviewing the sufficiency of the evidence, "courts apply the 'substantial evidence' test. Under this standard, the court 'must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence - that is, evidence which is reasonable, credible, and of solid value - such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' [Citations.]" (*People* v. *Cuevas* (1995) 12 Cal.4th 252, 260-261.)

The reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. (*People* v. *Mincey* (1992) 2 Cal.4th 408, 432.)

The standard of review is the same when the prosecution relies on circumstantial evidence to prove guilt. (*People* v. *Rodrigues* (1999) 20 Cal.4th 1, 11.) "'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' [Citations.]" (*People* v. *Thomas* (1992) 2 Cal.4th 489, 514, citing *People* v. *Bean* (1988) 46 Cal.3d 919, 932-933.)

The evidence, as set forth in other parts of this opinion, is more than ample to support appellant's robbery conviction. It was more than reasonable for the jury to infer that appellant was the robber. There is no requirement that the victim of a crime be able to identify the robber, or that all witnesses be able to do so. Further, it was up to the jury to decide Jung's credibility in light of all the circumstances, including the testimony of

another witness that Jung did not accurately describe appellant's appearance on the day of the robbery.

Disposition

The judgment is affirmed.

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ARMSTRONG, Acting P.J.

We concur:

MOSK, J.

KRIEGLER, J.